IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

RSA.No. 423 of 2006(A)

AS.273/2003 of I ADDL. DISTRICT COURT, PALAKKAD
OS.120/1999 of ADDL.MUNSIFF COURT, PALAKKAD
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: APPELLANTS/DEFENDANTS 1 TO 3:

1. ABDUDASWAMY, S/O SANDYAVU,
ANAYAPPANCHALLA, NILAMPATHY,
PUDUSEERY AMSOM, PALAKKAD. (DIED)

2. SANDYAVU, DO. DO. (RECORDED AS LEGAL HEIR OF DECEASED A1)

3. CHINNAPPAN, DO. DO.

ADDL.APPELLANTS 4 TO 6 IMPLEADED.
ADDL.A4.-MAIKKIL AMMA, AGED 50,
ANAYAPPANCHALLA, NILAMPATHY, PUDUSERRY AMSOM
PALAKKAD.

ADDL.A5- YENESI AMMA, AGED 35, -DO- -DO-

ADDL.A6- RAJINA MARY, AGED 29, -D0- -D0-

(ADDL.APPELLANTS 4 TO 6 ARE IMPLEADED AS THE LEGAL HEIRS OF DECEASED 1ST APPELLANT AND APPELLANTS 2 AND 3 ARE RECORDED AS THE LEGAL HEIRS OF DECEASED 1ST APPELLANT AS PER THE ORDER DATED 12/2/2007 IN I.A. NO.285/2007.)

BY ADV. SRI.N.SUKUMARAN
SRI.S.ANANTHASUBRAMANIAN
SRI.S.SHYAM
SRI.BOBBYMATHEW KOOTHATTUKULAM

RESPONDENTS: RESPONDENTS/PLAINTIFF AND DEFENDANTS 4 TO 6

1. S. UDYAKUMAR, S/O. SUBRAMANIAN PILLAI
ANAYAPPANCHALLA, PUDUSSERY AMSOM,

PALAKKAD.

2. GOPALAN, S/O. RAMAN,
PARAMANANDAM, PAMPAMPALLAM,
PUDUSSERY AMSOM, PALAKKAD.

3. S.K. KUMAR, S/O. SUBRAMANIAN PILLAI
ANAYAPPANCHALLA, PUDUSSERI AMSOM, PALAKKAD.

4. S. PREMKUMAR, S/O. SUBRAMANINA PILLAI,
DO. DO.

BY ADV. SMT.P.K.RADHIKA
SRI.E.RAMACHANDRAN FOR R1

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 06/09/2007,THE COURT ON THE SAME DAY PASSED THE FOLLOWING:-

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.423 OF 2006

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Dated this the 6th day of September, 2007

JUDGMENT

Defendants 1 to 3 in O.S.120/1999 on the file of Munsiff Court, Palakkad are the appellants. On the death of appellants 2 and 3, additional appellants 4 to 6 were impleaded as the legal heirs. First respondent is the plaintiff and other respondents the other defendants. First respondent instituted the suit seeking a decree for declaration of his title fixation of boundary and for permanent prohibitory injunction. Plaint schedule property along with the properties which lies to its north, west and south admittedly originally belonged to first appellant. Under Ext.A1 sale deed, first appellant sold the property to the father of first respondent in 1984. According to first respondent, thereafter his father surrendered 8 ½ cents out of the property voluntarily to the Government to start a Sub

Centree of the population project and appellant is in possession of the remaining portion of the property and respondents have no manner of right over the same and they have no right to use any portion of this property. Contending that they attempted to claim a right of way through the property, the suit was instituted seeking a decree for declaration and injunction. Contending that for effective decree defendants 5 and 6 were necessary they were impleaded. Only appellants contested the suit. In their written statement, it was contended that the extent of land surrendered to the Population Project was 10 cents. It was also contended that there was a pathway in existence, which was used by the appellants to take cart to their property and that property never belonged to first respondent or his father and that part of the property was not sold under Ext.A1 and it is the only way available to the appellants to reach their and therefore first respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pw1, Dws.1 and 2 and Exts.A1 to A3, C1 and C1(a) granted a decree in favour of first respondent finding that appellants are not entitled to dispute the right, title and possession of plaint schedule property sold by first appellant to the father of the first respondent under Ext.A1 in 1984. Though right of way claimed at the time of evidence, it was found that appellants have no right of way over the plaint schedule property. A decree declaring that appellants have no manner of right to the plaint schedule property or to use the property as the way was granted, after fixing the boundaries of the property in accordance with Ext.C1 (a) plan. A decree for injunction was also granted. Appellants challenged the decree and judgment before District Court, Palakkad in A.S.273/2003. Learned District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the suit. It is challenged in the second appeal.

3. Learned counsel appearing for appellants

and first respondent were heard.

4. The argument of learned counsel appearing for appellants is that in the written statement it was specifically contended that the only way available to the appellants to reach the eastern panchayat road is through the plaint schedule property and therefore courts below should not have granted a decree for injunction when appellants have a right of easement by necessity. The learned counsel vehemently argued that courts below did not properly appreciate the evidence and as the actual extent surrendered for the population project was not established, courts below should have found that entire plaint schedule properties were not in the possession of first respondent and the decree granted is not sustainable.

5. On hearing the learned counsel appearing for appellants as well as the learned counsel appearing for first respondent, I do not find any substantial question of law involved in the appeal.

6. As rightly found by the courts below, first

appellant is none other than the assignor of the father of the first respondent, who under Ext.A1 sold the plaint schedule property in favour of the father of the first respondent. Under Ext.A1, first appellant did not reserve any right of way through the plaint schedule property. What was contended even in the written statement was that the properties sold under Ext.A1 are the exclusive way which was being used by appellants prior to the execution of Ext.A1 sale deed. There was no case in the written statement that the way which was being used by appellants, is through the property sold under Ext.A1 or that because of the severence of the properties the remaining property of the appellants cannot be used without making use of the plaint schedule property as a way and therefore they have a right of easement by necessity. In such circumstance, courts below rightly found that appellants are not entitled to a right of way by easement of necessity through the plaint schedule property. That factual finding rendered by the

courts below, on the evidence, cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure by reappreciating the evidence, when the appreciation of evidence was just and proper. Eventhough learned counsel appearing for appellants sought an opportunity to file an application for amendment of the written statement, I do not find it just or proper at this stage to allow the submission.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

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M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006